UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WOLF CREEK NUCLEAR OPERATING CORPORATION

Employer,

and **Case No. 14-RC-168543**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 225

Petitioner.

PETITIONER'S RESPONSE IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S MAY 9, 2017 SUPPLEMENTAL DECISION

The International Brotherhood of Electrical Workers, Local 225, (hereinafter "Petitioner" or "IBEW 225"), by its undersigned counsel, submits this Response in Opposition to Employer's Request for Review of Regional Director's May 9, 2017 Supplemental Decision ("5/9/17 Decision"). There are no compelling reasons for the National Labor Relations Board (hereinafter the "Board") to grant review of the 5/9/17 Decision. For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review. The Petitioner also requests that the Board respectfully consider expediting its review of the Employer's Request for Review given the amount of time that has passed since this case was originally filed on January 28, 2016.

I. Introduction

On April 7, 2017, the Board issued a decision granting review of the Employer's first request for review on the issue of res judicata while denying the Employer's request in all other aspects without prejudice and remanded the case to the Regional Director to "more fully consider whether changed circumstances warrant declining to give the 2000 decision preclusive effect and issue a

supplemental decision."[1] The Regional Director was given discretion to re-open the record and take additional relevant evidence. On April 18, 2017, the Regional Director ordered the record reopened before a Hearing Officer on April 25, 2017.[2] On May 9, 2017, the Regional Director issued the 5/9/17 Decision finding that the evidence demonstrates that material changes warrant declining to give the decision in Case 17-UC-210 ("*2010 Decision*") preclusive effect. The Regional Director also found that the evidence no longer supports the conclusion that the petitioned-for buyers are managerial employees. On May 23, 2017, the Employer filed a Request for Review of the 5/9/17 Decision.

The Employer's request fails to meet its burden of establishing compelling reasons for review of the Regional Director's 5/9/17 decision. The Employer refers to the 5/9/17 Decision as a "grave and disturbing departure" from the *2000 Decision* and claims that it "does violence to well-settled Board law and legal principles." The Employer conveniently ignores the fact that the *2000 Decision* occurred 17 years ago. Further, the Petitioner established substantial evidence that while EMPAC was in existence in 1998 it has undergone fundamental changes since then which have greatly reduced and basically removed any ability of the Buyers' to act independently. Most notably, the Employer took steps in 2010 and thereafter to embed its policies and procedures into EMPAC. This means that the Employer's policies and procedures which govern the Buyers' job duties are written into the EMPAC software and alert the Buyers' when they may be in risk of violating those procedures. It also ensures that all required approvals from members of management are received before a purchase order is issued.

The Buyers' also do less competitive bidding now than they did in 2000. This is because the Employer has continued to increase its use of alliance agreements which identify single-source

[1] *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55, slip op. at 3 (April 7, 2017).
[2]

suppliers for many of its purchases. The Buyers' do not play any role in those negotiations. This simply rely on those agreements to dictate who they purchase pre-approved items from. Additionally, many of the job duties that the *2000 Decision* relied upon to find the Buyers' to be managerial employees are now mostly completed by EMPAC itself.

The record established in this case is clear. The Buyers' job duties have gone through substantial and material changes since the *2000 Decision* which justifies relitigation of the Buyers' managerial status. The record in this case also clearly establishes that the Buyers' are no longer managerial employees under the Act. This is not the question, however, for the Board to consider. The Board must consider whether the Regional Director's decision is **clearly erroneous** due to either a departure from established Board precedent or the fact established in the record. The Employer's request wholly fails to meet this burden. Even if the Board finds that the Employer's argument in favor of managerial status persuasive, that in and of itself is not enough. The Board must find that the Regional Director's decision is not plausible based on the factual record or the relevant Board precedent. Under that standard, the Employer's request for review must be denied. None of the assertions made by the Employer warrant review by the Board.

II. Standard of Review

29 C.F.R. § 102.67(c) allows for parties to file a request for review of regional director actions at "any time following the action until 14 days after a final disposition of the proceeding by the regional director." The Board only grants requests for review where "compelling reasons exist therefore." § 102.67(d). One or more of the following grounds must exist for review to be granted: (1) that a substantial question of law or policy is raised because of (i) the absence of; or (ii) a departure from, officially reported Board precedent; (2) that the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) That the conduct of any hearing or any ruling made in connection with the

proceeding has resulted in prejudicial error; or (4) that there are compelling reasons for reconsideration of an important Board rule or policy." *Id.*

The Employer asserts that the Regional Director's decision both raises substantial questions of law or policy because of a departure from officially reported Board precedent and that the Regional Director made decisions on substantial factual issues that are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. First, it must be noted that the Employer attempts to rely on officially reported Board precedent that is inapplicable to this case. Second, where the cases cited by the Employer do apply, the decision of the Regional Director does not depart from officially reported Board precedent in a way that raises a substantial question of law or policy. The Regional Director applied the governing Board case law, including Concept & Designs, Inc., to the facts of the underlying case and reached a just and proper conclusion. It is not enough to simply disagree with the outcome of the analysis to meet the standard for review. There is little question that the Employer disagrees with the results, but it has failed to make a compelling argument that establishes a substantial departure from officially reported Board precedent.

The Employer has also failed to establish that any decisions on substantial factual issues are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. The "clearly erroneous" standard is significantly deferential and requires a "definite and firm conviction that a mistake has been committed." Easley v. Cromartie, 532 U.S. 234, 242 (2001). It is not enough for the Employer to disagree with the finding. If the Regional Director's account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

There is little question that, at a minimum, there is clearly two permissible views of the evidence established in this case. While the Employer has made it quite clear that it does not agree

with the Regional Director's 5/9/17 Decision, the Employer has failed to establish that its view is the only plausible view of the evidence in the record. This is partly due to the fact that the Employer failed to controvert crucial facts in this case such as the fact that while EMPAC was in existence in 1998, it was not fully functional. Additionally, the Employer failed to controvert the fact that EMPAC underwent substantial changes through upgrades in software in 2002 and 2008 which began to make fundamental changes in the Buyers' job duties. The Employer also failed to controvert the fact that the Employer's IT department wrote the Employer's policies and procedures into EMPAC around 2010 which resulted in "flags" popping up to alert the Buyers' when they are at risk of violating their procedure by not including required terms or not having required approvals. The Employer has also failed to controvert the fact that the Employer has negotiated Alliance Agreements which has resulted in substantial reductions in the Buyers' use of competitive bidding. All of these uncontroverted facts establish, at a minimum, that the Regional Director's view is plausible based on the record.

The Employer has also relied heavily on *Concepts & Designs* to argue that the Regional Director's decision is clearly erroneous due to a departure from established Board precedent. That argument is misplaced and falls short of the reality of the existing Board precedent. Several of the cases relied upon by the Regional Director actually rely on *Concepts & Designs* to reach their finding that the Buyers' in question are not managerial employees under the Act. Additionally, the Regional Director's reliance on *Lockheed-California Company* is certainly reasonable and plausible when looking at the facts of this case. Again, just because the Employer disagrees, does not mean the Regional Director's decision was clearly erroneous. For those reasons, the Employer has failed to establish compelling reasons for review under the applicable standard of review.

III. Relevant Facts

A. Finding of Facts in the February 16, 2016 Hearing

On May 4, 2000, the Acting Regional Director of then Region 17 found the Buyers to be managerial employees in a "Decision, Order and Clarification of Bargaining Unit" issued in Case 17-UC-210 ("*2000 Decision*"). (2/5/2016, D&DE, pg. 1). The Regional Director, in his decision in the instant case noted, that "the *2000 Decision* was issued almost 16 years ago, and it is incumbent on the Regional Director to create a record documenting how circumstances have changed with regard to Buyers and their duties and responsibilities." (2/5/2016, D&DE, pg. 3). The Regional Director also noted that the transcript from the 2000 proceedings was not available and the *2000 Decision* does not contain a detailed description of the Buyers' job duties and **did not address those duties in relation to computer software used by the petitioned-for employees**. (*Id*).

At the hearing, the Petitioner spent a great deal of time introducing specific detailed evidence detailing how the EMPAC computer system impacts the employee status of the Buyers. (*Id*). The facts established at the hearing included:

- Purchases are initiated when the Purchasing Department receives a requisition, which are created through the Employer's EMPAC computer system by the requesting department. (2/5/2016, D&DE, pg. 4).

- The requisition lists the items that are being requested; how many of the items are needed; the commodity code; whether the item is engineered or safety-related; the item's price; and whether the item has been bought before and, if so, the price the Employer paid in the past. The Buyers are not involved in the initial requisition process. (*Id*).

- Not all employees are allowed to submit a requisition. The Purchasing Department trains employees on how to submit requisitions, and David Sullivan (Manager of Purchasing and Supply Chain Services) approves individuals so they can be entered into EMPAC and allowed to submit requisitions. (*Id*).

- Requisitions must be authorized by a supervisor or manager in the requesting department prior to submission through EMPAC. The Buyers are not involved in the requisition authorization process. (*Id*).

- The level of purchasing authority that a Buyer has correlates with the purchasing authority that the signatory requestor has. For example, if a requisition has $50,000 in purchasing authority, the Buyer then has up to $50,000 to use to purchase the requested item. (*Id*).

- Once a requisition is received by the Purchasing Department, Everett Weems (Supervisor of Purchasing and Contracts) assigns each requisition to a Buyer depending on the type of items being requested. (*Id*).

- After being assigned the requisition, the Buyer first determines whether the procedure requires the item be competitively bid. Where the value of goods and services is expected to exceed $50,000, the Employer's written policy requires the Buyers to issue a competitive bid for goods/services. In practice, the Buyers also competitively bid items that cost well under $50,000 on a regular basis. (2/5/2016, D&DE, pg. 5).

- A new competitive bidding procedure was established on or about January 21, 2016. Under the new procedure, the $50,000 limit over which items must be competitively bid increased from $5,000 to $50,000. The Buyers were not involved in the decision to raise the minimum competitive bidding amount. (*Id*, fn. 2).

- According to the Employer's procedures, to begin the competitive bidding process, "the Buyer determines the suppliers from whom to solicit bids based on commercial, technical and/or quality considerations." In practice, the Buyer first compiles a list of potential suppliers from which to seek a bid using EMPAC. EMPAC provides the Original Equipment Manufacturer ("OEM") and the price of any previous orders. (*Id*).

- To select suppliers, the Buyers go to the item's OEM or other Employer-authorized distributors. The Buyer also may find suppliers using the internet (e.g., Google searches). For safety items, Buyers are required to use suppliers on a specific list. Sometimes, there is only a single supplier for a certain product, so there are no other companies from which to seek bids. (*Id*).

- Once the Buyer has compiled a list of potential suppliers, the Buyer uses EMPAC to generate a Request for Quotation ("RFQ") to send to those suppliers. EMPAC allows the Buyer to tailor the RFQ to match the requisition by using established request clauses and information. For example, if the requisition states delivery must be expedited, the Buyer will use EMPAC to include a clause with this request in the RFQ. The Buyer determines the bid due date, which is set based on the initiating organization needs and detailed as requested dates in the original requisition. (D&DE, pg. 4-5).

- Sometimes suppliers will request an exception to the RFQ. If the product is safety-related or engineered, the Buyer sends the exception to the Procurement Engineer who determines whether the exception is acceptable. If the product is non-safety related, Buyers will typically go back to the requisitioner for input on the exception. (D&DE, pg. 6).

- Upon receiving the bids from suppliers, the Buyer will enter the bids into EMPAC and then EMPAC performs a bid analysis. Typically, the Buyer will select the lowest bidder. If a Buyer does not make the purchase with the lowest bidder, the Buyer is required to enter into EMPAC the reason why the supplier was chosen. (*Id*).

- The Employer's witness, Betty Sayler, testified in regards to how EMPAC automatically calculates the low bidder. "As a general rule, I'll enter them into our EMPAC database. We've got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it's going to calculate low bidder, it's going to give me FOB terms and it's going to give me payment terms. (Tr. 184: 20-25).

- Once a supplier is selected, the Buyer drafts a Purchase Order in EMPAC. EMPAC allows the Buyer to select different clauses regarding terms and conditions to use in the Purchasing Order and will then issue the Purchasing Order. EMPAC has a mechanism to notify a Buyer if the forgot to include terms and conditions in the Purchasing Order. (*Id*).

- If bids come back and are more than $1,000 per line item than what was on the original requisition, the Buyer will go back to the requisitioner for funding approval before issuing the Purchase Order. If a bid comes back and is still above the original requisition price, but less than $1,000 per line item, the Employer's procedure provides that a Buyer can make the purchase. (D&DE, pg. 6-7).

- EMPAC will specifically ask the Buyers if they received funding approval before the system creates the Purchasing Order. Once the Purchasing Order is issued, the Buyer has committed Employer funds for the purchase of requisition funds. (D&DE, pg. 7). When EMPAC was originally installed at the Employer's facility, it did not include this notification. It was added after the fact by management and the Buyers were not involved in that decision. (*Betty Sayler*, Tr. 195: 3-11).

- On cross-examination, Ms. Sayler confirmed that once the requisition gets to the Buyers, it has already been through the approval process and it is locked in. The Buyer can't make any changes without approval from someone else. (Tr. 196: 19-25).

The Buyers also testified in specific detail as to how their job duties changed from pre-*2000 Decision* to today with EMPAC and how the nuclear industry is much more restrictive when it comes to purchasing:

- When asked what has changed in how Ms. Somerhalder does her work as a Buyer with the addition of EMPAC, Ms. Somerhalder stated that there are "more checks and balances with the EMPAC system. There's --- again, if we're typing a PO, there's flags that will pop up, a pop-up barrier that will say – you know, if it exceeds the funded amount on the requisite, the amount that's funded on the requisition, it will pop up and remind you and say, hey, check your – or in essence, check your procedure for – do you need to go back for an email for approval of additional funds or do you need a CASF form?" (Tr. 145: 8-16).

- Additionally, Ms. Somerhalder testified that "there's audit trails of everything." When asked if these audit trails existed in 1996, she testified that they did not. She stated that

"after the Sarbanes-Oxley Act, our owner companies started auditing us. So they would ask for POs and the request for quote package, which everything's filed in curator now for perpetuity. (Tr. 145: 16-25).

- Mr. Sean Nelson testified that, as an individual who worked as a Buyer in both the nuclear and non-nuclear industry that "nuclear is completely different, much more restrictive. When I was doing refinery projects, I would write the descriptions and could make changes and all that and it wasn't a big deal, but we weren't dealing with a nuclear power plant. (Tr. 167: 18-22).

- On direct, Employer's witness Betty Sayler was asked about what functional difference EMPAC brought to her job as a Buyer. Ms. Sayler testified that 'EMPAC just gave us automation, it gives us more tools, it's a difference of day [and] night actually." (Tr. 186: 10-12); 194: 5-13). This confirmed what the Buyers stated in their testimony. (*Tracy Beard*, Tr. 88: 20-25; 89: 1-6 ("there is just really no comparison."); *Sandra Somerhalder*, Tr. 140: 19-25 (in comparing MAPPER to EMPAC, it was a very "manual process. Everything had to be entered manually. It did not have the sophistication as compared to EMPAC. It did not have the functionalities.")).

- The Employer's witness, Betty Sayler, testified in regards to how EMPAC automatically calculates the low bidder. "As a general rule, I'll enter them into our EMPAC database. We've got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it's going to calculate low bidder, it's going to give me FOB terms and it's going to give me payment terms. (Tr. 184: 20-25). Ms. Somerhalder confirmed in her testimony that MAPPER did not have this type of functionality. (Tr. 140: 19-25).

B. Facts Established in the April 25, 2017 Hearing

The parties stipulated at the hearing that MPAC came into existence in November 1998 at Wolf Creek. (Tr. 250:17-21). However, Petitioner established undisputed evidence that when MPAC came into existence MPAC really "limped along" and the buyers' were continuing to use the old MAPPER program in addition to MPAC. (*Rogers*, Tr. 257: 9-16; 259: 14-23; *Somerhalder*, Tr. 281: 5-9). Additionally, in 2002, MPAC went through an upgrade from revision 7.7 to 8.5. This caused major changes to the policies and procedures that the buyers and other Wolf Creek employees were required to follow. (Tr. 262: 11-14; Exhibit P7). Numerous revisions listed in the "DRR" indicate that the changes made were required by the upgrade in MPAC to revision 8.5. (Exhibit P7, pgs. 1-10). Ms. Somerhalder also testified that AP-24-002 is the buyers' "mother procedure" and the more

changes made to this procedure, the more it impacted and controlled the buyers work. (Tr. 282:1-10).

One of the most important changes that came with the 8.5 revision in 2002 was the addition of curator. (*Somerhalder*, Tr. 280: 18-23). According to Ms. Somerhalder, the first requisition available in curator for review came in 2002. Curator also brought with it the ability to conduct detailed audit trails as identified in Exhibit P13. (Tr. 280: 18-23). However, it was not until 2006 that MPAC became an entirely automated program. This brought with it key changes to the Employer's procedures and the buyers' work. First, the process of sending purchase orders and all related documents to document services for processing and storage was eliminated. (Exhibit P8; Tr. 284: 18-25; 285: 1-4). These documents began being placed in curator. This allowed for MPAC to have direct access to these documents and be able to pull those documents for use in future purchase orders. Second, the main procedure AP 24-002 was changed with specific application to procedures for competitive bids by requiring adherence to an entire other procedure, AP 24C-009 which governs the process for "requests for quotation." (Exhibit P9; Tr. 288: 15-25). These changes occurred in March 2006. (Tr. 286: 8-10).

Another major change that occurred in 2008 is that MPAC was again upgraded to revision 8.6 which is the revision currently in place today. (Tr. 291: 18-23). Ms. Somerhalder indicated that one of the major changes with the 2008 revision was that the commodity code, while used previously, was added to MPAC which helped ensure for automatic routing of requisitions for approvals. (Tr. 372: 17-25).

One of the most crucial changes to MPAC came sometime after 2010 according to Ms. Somerhalder. Exhibit P11 contains a number of "condition reports" created in 2009 and 2010 by former Lead Buyer Betty Sayler. Ms. Sayler created these condition reports because the buyer completing the requisition in those documents had failed to obtain the required approvals or failed

to include required information. These condition reports, according to the testimony of Ms. Somerhalder, led to the creation of the dialogue "pop-up" boxes contained in Exhibit P12. These dialogue boxes are key because they were designed by the Employer's IT department based on condition reports such as those in P11 to stop those errors from happening. These dialogue boxes pop up anytime a buyer attempts to process a purchase order without having certain required approvals or if they are missing certain required clauses or terms. MPAC now tells the buyers when something is missing. Before these post-2010 changes in MPAC, the buyers were on their own to ensure these mistakes didn't happen.

Additionally, the buyers' purchase order procedure was changed in 2006 to put the responsibility on reviewing and ensuring the accuracy of the purchase orders on the buyers as opposed to the supply chain manager. Ms. Somerhalder and Ms. Beard both testified that this was not due to management trying to give the buyers' more discretion. It was instead, an indication that MPAC's capabilities in overseeing and checking the buyers' work grew to a point that the supervisors review was not necessary. Mistakes were routinely caught and fixed through the use of MPAC. According to Ms. Somerhalder and Ms. Beard, MPAC incrementally became the de-facto supervisor of the buyers'.

Evidence was also established through Exhibit P13 that the buyers' do not have access to any management reports filed in supply chain services by their managers. The record also establishes that the buyers' are not even listed in the document that lists which employees have the power to commit certain levels of expenditures through their approvals. (Exhibit P14). It is also important to note that the PAR bonus program, which is paid to employees based on a hierarchy of their employment status, classifies the buyers' in the general employees section above bargaining unit employees but below that of supervisors and managers. (Vickrey, Tr. 433: 18-25; 434: 1-23).

Tracy Beard also testified that her job duties changed substantially in 2011 when the service labor contract work that she was completing was removed from the buyers' department and transferred to the contract services department. She went from actually drafting agreements revolving around software licensing to doing buyers work 100 percent of the time using MPAC. (Tr. 396: 19-25; 397: 1-20).

IV. Argument and Authorities

A. The Regional Director's Finding of a Material Change to the Buyers' Job Duties was not Clearly Erroneous

While the Employer disagrees with the Regional Director's finding of a material change in the Buyers' job duties justifying relitigation of the Buyers' managerial status, its' discontent is simply not enough to justify review of the Regional Director's decision. The Employer bears the burden of establishing that the Regional Director's decision was **clearly erroneous** based on the facts established on the record. As previously discussed, the "clearly erroneous" standard is significantly deferential and requires a "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). It is not enough for the Employer to disagree with the finding. If the Regional Director's account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

1. The Petitioner's Burden of Establishing a Material Change is "not an Onerous One"

As the Board indicated in its April 7, 2017, decision, while it is the Petitioner's burden to prove that there has been a material change in the buyers' circumstances which would justify relitigation of the buyers' managerial status, that burden is not an onerous one. In fact, pointing to "one material differentiating fact" would be sufficient to justify such relitigation. *Wolf Creek*, 365 NLRB No. 55, slip op. at 3. According to *Black's Law Dictionary*, something is "material" if it is "[o]f

such a nature that knowledge of the item would affect a person's decision-making."[3] Thus, the Petitioner has met its burden if it has established one factual change in circumstances for the buyers' which would affect the buyers' decision-making process at Wolf Creek.

The record establishes that EMPAC came into existence at Wolf Creek in approximately November 1998 It was also conclusively established at when EMPAC was implemented in late 1998, the EMPAC system did not have the functionality that it does presently and the Buyers' continued to use MAPPER in the performance of their duties. Additionally, EMPAC has been repeatedly and significantly modified to add new capabilities and functions since the *2000 Decision*. These changes occurred in 2002, 2008 and 2010. In 2002, EMPAC went from revision 7.7 to revision 8.5. In 2006, the record establishes that the Employer made upgrades in technology which allowed for EMPAC and Curator to interact and store information about previous purchases and supplier information. Additionally, in 2006 the commodity code was changed which provided for automatic routing of the requisition to the different departments and management who were required to approve any purchases. In 2008, EMPAC was again upgraded to Revision 8.6 which is its current revision. Each upgrade brought with it substantial changes to the procedures the Buyers' are required to operate within.

Most significantly, the record establishes that the technological changes in EMPAC enhanced the Employer's ability to monitor and control the requisition process. EMPAC has been programmed to conform with the Employer's procurement policies to ensure that the Buyers' do not make mistakes or go outside of those procedures. As EMPAC has evolved since 2000, the Employer has continued to program checks and balances into the system to ensure that the employees comply with relevant procurement policies. As evidenced in Petitioner's exhibits 11 and

[3] *See Black's Law Dictionary*, Tenth Edition, Bryan A. Gardner, pg. 1124.

12, this programming resulted in EMPAC being programmed to flag certain fields to alert the Buyers' to potential policy violations.

There is little question that the record contains substantial evidence of changed circumstances in the Buyers' job duties justifying relitigation of the Buyers' managerial status. Additionally, while the Petitioner's burden of establishing such changed circumstances "is not an onerous one," the Employer's burden of establishing the Regional Director's decision is "clearly erroneous" is an onerous one. It requires the Employer to show that the Regional Director's decision is one which creates a "definite and firm conviction that a mistake has been committed." The Employer must show that the Regional Director's decision is not plausible in light of the entire record. There is little question that the Employer has fallen well short of meeting this standard. The Regional Director's decision is based on relevant competent evidence and is clearly plausible based on the established record.

2. The Changes in the Buyers' Job Duties Since 2000 Enhanced Regulation and Oversight of the Buyers' Work While Reducing Discretion

The Employer rests most of its argument on Board precedent finding technological changes are insufficient to establish material changes to a job classification. While the Employer correctly cites the Board's well-established precedent, it incorrectly applies it to this case. This case is more than just technological changes and innovation. Changes to EMPAC do more than simply making the Buyers' job easier to do. The changes to EMPAC since the *2000 Decision* have fundamentally limited the Buyer's discretion. As the Regional Director pointed out, these changes have taken information that was once available only in the mind of a seasoned Buyer, is now not only automatically assessable electronically, they are built into EMPAC along with the Employer's policies and procedures with automatic pop-up warnings alerting Buyers' when they need certain approvals or may be violating procedure.

Additionally, in several aspects, EMPAC actually performs the functions for which Buyers were previously independently responsible. EMPAC automatically analyzes and calculates the low bid and shipping terms. EMPAC also automatically obtains the required approvals before the requisition gets to the Buyers'. In the event that the requisition is changed by the Buyers' EMPAC notifies the Buyer that additional approvals are required and automatically routes the requisition to the individuals required to approve it. Beyond the technological changes, the record also establishes that the Employer no longer relies on the Buyers' to prepare competitive bids for purchases and review price quotes as frequently as it did in 2000. The Employer has continued to increase its use of single-source supplies through negotiated alliance agreements. The record also establishes that the Buyers' do not negotiate these agreements. The record also establishes that the Buyers' now consult with other departments on responses to RFQs where in the past they did not.

Thus, while the Employer correctly argues that changes in technology alone do not constitute changed circumstances, the record in this case clearly establishes that the changes to the Buyers' circumstances are more than simply innovation in the technology they use. They are fundamental changes to the Buyers' job duties which severely restrict their discretion. Additionally, under the clearly erroneous standard, the Employer has fallen well short of its required burden. For those reasons, the Employer's request should be denied and the Regional Director's decision should be allowed to stand.

B. The Regional Director's Finding that the Buyers' are not Managerial Employees was not Clearly Erroneous

Just as discussed above, the Employer's burden is not to persuade the Board that their position is the preferable one. It is to establish that the Regional Director's decision is clearly erroneous. The Employer must establish that the Regional Director's decision that the Buyers' are not managerial employees is not plausible in light of the entire record.

Further, the Employer's white knuckled grip on *Concept & Designs* as its life preserver on review is greatly misplaced. *Concept & Designs* stands for the concept that employees who make routine purchases for an employer, within and not independent of Employer procedures, are not managerial employees while those who commit substantial amounts of an employer's credit without review or approval are managerial employees. 318 NLRB at 957. However, where review or pre-approval is required, the commitment of substantial amounts of an employer's credit, alone, does not establish managerial status. The Employer also cited *Swift & Co.* as a basis for review of the Regional Director's decision. 115 NLRB 752 (1956) While it is true that the Board has found that the ability of an employee to commit an employer's credit in amounts which are substantial is strong evidence of managerial status, that fact alone is not dispositive. Swift also required the commitment of the substantial amount of credit to be unreviewed, not pre-approved, and subject to the discretion of the employee committing the credit. 115 NLRB at 753.

As the Regional Director also pointed out, this case more clearly resembles *Lockheed-California Co.*, which established that although a buyer can commit a company's credit up to $50,000 and also negotiates prices with suppliers, where that buyer does not have discretion independent of established policy since higher authority must review and approve much of their recommendations, those buyers are not managerial employees. 217 NLRB 573 (1975). Additionally, *Solartec, Inc. & Sekely Indus.* found employees to be not managerial even though they had authority to recommend purchase and use equipment and negotiate with supplier. 352 NLRB 331, 336 (2008). In *Eastern Camera and Photo Corp.*, the Board found that:

> Managerial status is not necessarily conferred upon employees because they possess some authority to determine, within established limits, prices and customer discounts. In fact, the determination of an employee's managerial status depends upon the extent of his discretion, although even the authority to exercise consideration discretion does not render an employee managerial where his decisions must conform to the employer's established policy. 140 NLRB 569 (1962) (cited and relied upon in *Concept & Designs*, 318 NLRB at 957).

The record firmly establishes that the Employer has substantially limited the amount of independent discretion the Buyers' exercise. This is due to the Employer's evolving practices and requisition and procurement policies, which have been embedded into the EMPAC software to the extent that it eliminates much of the Buyers' independent discretion. As was pointed out by the Petitioner in its previous opposition to the Employer's Request for Review, the Buyers' make absolutely no purchases without an approval of a member of management. Petitioner's Exhibit 14 contains the complete list of those who are qualified approvers of requisitions and lists the dollar amount they are allowed to approve up to. It is important to note that the Buyers' are not even listed in this document at all. This is important evidence establishing that they have no ability to commit the Employer's credit on their own.

V. Conclusion

For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review as no compelling reasons for granting such review exists under 29 C.F.R. § 102.67(d).

Respectfully Submitted

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CERTIFICATE OF SERVICE

The foregoing, Petitioner's Response in Opposition to Employer's Request for Review, filed by IBEW 225 in Case No. 14-RC-168543 was served upon the Employer and Region 14 by electronic mail on May 30, 2017, to the following:

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